UNITED BANK LTD.

v.

BANQUE NATIONALE DE PARIS & ORS.

HIGH COURT, SINGAPORE
CHAO HICK TIN J
[SUIT NO. 658 OF 1982]
7 JUNE 1991

BANKING: *Letter of credit - Name of beneficiary different - Duty of issuing bank to check - Strict compliance - Commercial significance - Duty of issuing bank to reject payment - Meaning of "collection bearing" - Duty of reasonable care - Onus and burden of proof - Causal connection between loss and failure of bank to notify beneficiary of amendments which caused the loss - Uniform Customs & Practice for Documentary Credits [Sing], Article 8(e), (f).*

In October 1980, the third defendant (SMH) applied to the plaintiff (UBL) to open a letter of credit (LC) for US$220,000 in favour of PAL, a Singapore company. The LC was for the purchase of 1000 metric tons of wheat bran. On 1 November 1980, the plaintiff issued the LC in favour of PAL, subject to the provisions of the Uniform Customs and Practice for Documentary Credits (UCP). Immediately thereafter, the plaintiff sent a telex to HSBC (the second defendant), the advising bank, informing them of the LC facility. On 3 November 1980, HSBC informed the beneficiary of the LC. The LC, stated to be "unrestricted for negotiations" was posted by the plaintiff to HSBC.

Meanwhile, on 6 November 1980, SMH requested UBL to amend the LC to add two additional requirements - firstly, that documents should include a certificate from NT that goods shipped are in good condition and secondly, that 1% empty bags to be supplied free of charge. The amendment letter which was addressed to PAL, was sent by the plaintiff on 6 November 1980 to HSBC for onward transmission to PAL. On 9 November 1980 the plaintiff sent to HSBC an amendment telex.

HSBC received the original LC through the mail on 11 November 1980. It was forwarded to PAL on 12 November 1980. The amendment letter from UBL was received by HSBC on 18 November 1990. On 19 November 1980, BNP negotiated the LC in favour of PAPL (the difference between PAL and PAPL being the additional word "Pte" in the corporate name).

On 19 November 1980 HSBC telexed the plaintiff, enquiring whether the LC for PAL should read PAL instead of NT. On 20 November 1980, HSBC forwarded the original amendment letter to PAL and on 22 November 1980, HSBC sent a telex reminder to UBL asking the latter to reply to the enquiry telex of 19 November 1980. On 23 November 1980 the plaintiff replied that the beneficiary had not changed; the only change was that a further certificate should be obtained from NT. HSBC sent the amendment telex of 9 November 1980 to PAL only on 24 November 1980. On 3 December 1980, PAPL told HSBC that the amendment could not be accepted because shipment of the goods had already been effected.

The plaintiff, in his action against BNP (the first defendant), sought to recover from BNP US$220,000 on the ground that BNP was in breach of the duty of care in negotiating the LC and paying to a person other than the beneficiary named in the LC. Further, as the LC was issued subject to the UCP, the plaintiff also claimed that they were entitled, under Article 8(e) & (f) of the UCP, to a refund of the money paid out to BNP under the LC.

As against HSBC (the second defendant), the plaintiff's claim is for the loss and damage they have suffered on account of HSBC's failure to exercise reasonable diligence, skill and care as advising bankers in promptly notifying the beneficiary and/or his bankers of the requested amendments and/or in seeking agreement to such amendments.

Held:

[1] The difference between the LC and the documents tendered is in the word "Pte", although in both, the address of the beneficiary was the same. The question that has to be determined was whether the difference in the name was such that BNP should not have negotiated it without the approval of the issuing bank, the plaintiff.

[2] In transactions involving LC the parties are only concerned with documents and therefore, there, should be strict compliance in the documents. Any discrepancy, other than obviously typographical errors, will entitle either the negotiating bank or the issuing bank the right to reject payment.

[3] On the question of whether the discrepancy in the name was commercially insignificant, whether a tender is good or bad cannot depend on whether the banker is aware that in law you cannot have a company "ABC Pte. Ltd." and another company "ABC Ltd." It is seriously doubted whether the bank is expected to make enquiries as to whether a Registrar will in certain cases, register a company under s. 27(1)(c) of the Companies Act. The bank is entitled to reject the documents unless the beneficiary replaces the documents with new documents in the correct name or request the applicant of the LC to agree to the modification.

[4] On the question as to whether there was a proper rejection of the documents by the plaintiff in accordance with Article 8 of the UCP, the plaintiff should have stated that the documents were "being held at the disposal of the negotiating bank or were being returned thereto." In addition, their telex of 4 December 1980 was too late as it was not issued within reasonable time under Article 8. Accordingly, having failed to comply with Article 8(e) and (f) of the UCP, the plaintiff was precluded from making a claim against BNP for a refund.

[5] With regard to the plaintiff's claim against the second defendant (HSBC), the basic consideration was whether HSBC had failed to exercise all reasonable care to bring the amendments to the attention of the beneficiary and whether the loss was caused by that failure. The burden of proof is on the plaintiff to show that the failure of HSBC in notifying the beneficiary of the amendments had caused the loss.

[6] On the evidence, the plaintiff had failed to discharge the burden of proof of the causal connection between the loss and the failure on HSBC to notify the beneficiary of the amendments in good time.

[Plaintiff's application dismissed.]

Cases referred to:

Bank Melli Iran v. Barclays Bank [1951] 2 Lloyd's Rep 367 ***(cons)***
Bank of Montreal v. Federal National Bank & Trust Co. of Shawnee 622 Fed Supp 6 ***(dist)***
English, Scottish and Australian Bank Ltd. v. Bank of South Africa [1922] Lloyd's Rep 21 ***(cons)***
Equitable Trust Co. of New York v. Dawson Partners Ltd. [1927] Lloyd's Report 49 ***(cons)***
J H Rayner v. Hambro's Bank [1943] 1 KB 37 ***(foll)***
Moralice (London) Ltd. v. E D & F Man [1954] 2 Lloyd's Rep 526 ***(cons)***
Overseas Union Bank v. Chua Teng Hwee [1964] MLJ 165 ***(cons)***
The Galatea [1979] 2 Lloyd's Rep 450 ***(cons)***
The Royan [1988] 2 Lloyd's Rep 250 ***(cons)***

Legislation referred to:
Companies Act [Sing], s. 27(1)(c)

Other source referred to:
The Law of Bankers' Commercial Credits, 7th Edn. p. 120 by Gutteridge & Megrah

For the plaintiffs - K S Chung (Namazie with him)
For the 1st defendant - Howard Cashin (Myint Soe with him)
For the 2nd defendant - Tan Kok Quan (Lee Han Tiong with him)

JUDGMENT

Chao Hick Tin J:

This action concerns a letter of credit and is instituted by an issuing bank against a negotiating bank, an advising bank and the applicant for the letter of credit.

The plaintiffs are and were a bank carrying on business in the United Arab Emirates. The 1st defendant was the bank that negotiated the letter of credit on behalf of the beneficiary. The 2nd defendant was the advising bank of the plaintiffs. The 3rd defendant was the customer on whose application the plaintiffs issued the letter of credit. In this judgment I shall refer to the plaintiffs and the 1st and 2nd defendants as UBL, BNP and HSBC respectively. In passing I should add that the plaintiffs have already obtained a judgment in default of appearance against the 3rd defendant.

The events which led to this action are as follows. In October 1980, the 3rd defendant applied to UBL to open a letter of credit in the amount of US$220,000 in favour of a Singapore company called "Pan Associated Ltd." for the purchase of 1,000 metric tonnes of wheat bran white and thick quality. On 1 November 1980 a letter of credit was duly issued by UBL in favour of "Pan Associated Ltd." of Suite 1908A, 19th floor, International Plaza, Anson Road, Singapore 0207 (AB24), subject to the provisions of the Uniform Customs and Practice for Documentary Credits (1974 Revision), hereinafter called the UCP. Immediately on the issue of the letter of credit a telex was sent on the same day by UBL to HSBC in these terms:

> Opened Credit AD80/1866 dtd 1 November 1980 for about US$220,000 C & F Abu Dhabi fvg M/s Pan Associated Ltd. Suite 1908 A 19th International Plaza Anson Road Singapore - 0207(.) Openers M/s. Al-Afrah Stores Abu Dhabi. Merchandise about 1,000 m. tons wheat bran white and thick quality. Shipment and negotiation latest by 30 December 1980. **Details airmailing.** (Emphasis is mine).

On 3 November 1980, HSBC informed the beneficiary of the opening of the letter of credit. The letter of credit issued had these words written at the top right corner, "This is in confirmation of our cable dated 1 November 1980."

The letter of credit was stated to be "unrestricted for negotiations." It was posted by UBL to HSBC. In the meantime on or about 6 November 1980, the 3rd defendant requested UBL to amend the letter of credit to add two additional requirements: (i) "Documents should include certificate from M/s. Naraina Trading (Pte) Ltd., 113 High Street Plaza, Colombo Court, Singapore stating that the goods shipped are in good condition"; and (ii) "one percent empty bags must be supplied free of charge." These amendments were conveyed in a letter dated 6 November 1980 from UBL addressed to the beneficiary, Pan Associated Ltd., which also stated that "all the other terms and conditions remained unchanged." This amendment letter was sent by UBL to HSBC for onward transmission. Three days later on 9 November 1980, UBL sent a telex to HSBC in these terms:

> 8250 Nove 6th Nil Amount
> Our credit AD80/1866 1 November 1980 for about US dlrs 220,000.

(1) ... (as quoted above)
(2) ... (as quoted above)

Confirmation airmailing

This telex is hereinafter referred to as "the amendment telex."

The original letter of credit was received by HSBC through the mail on 11 November 1980. It was duly forwarded to the beneficiary on 12 November 1980. On 19 November 1980, BNP negotiated the letter of credit in favour of Pan Associated **Pte** Ltd.

In the meantime the amendment letter from UBL was received by HSBC on 18 November 1980. On 19 November 1980 HSBC telexed (hereinafter referred to as "the enquiry telex") UBL as follows:

RYT dated 9 November 1980
Your credit No AD80/1866 for USD220,000
favouring Pan Associated Ltd.
Applicant: Al Afrah Stores.
Please confirm by return telex today the name of beneficiaries should read as Pan Associated Ltd. instead of M/s. Naraina Trading Pte Ltd.

It should be noted that this telex referred to the amendment telex of 9 November 1980 and not the amendment letter of 6 November 1980 received the day before. It also referred to the beneficiary as Pan Associated Ltd.

However, on 20 November 1980, before a reply was received from UBL, HSBC forwarded the original amendment letter to M/s. Pan Associated Ltd. Yet on 22 November 1980, HSBC sent a telex reminder to UBL asking the latter to reply to the enquiry telex of 19 November 1980. UBL replied on 23 November 1980 stating that the beneficiary had not changed; the only change was that a further certificate should be obtained from Naraina Trading (Pte) Ltd. Only on 24 November 1980 did HSBC send the amendment telex of 9 November 1980 to the beneficiary, Pan Associated Ltd. On 3 December 1980 Pan Associated Pte Ltd. replied to HSBC to say that the amendments could not be accepted as shipment of the goods had already been effected.

Having negotiated the letter of credit and reimbursed itself of the amount due thereunder, BNP forwarded all the documents to UBL by registered airmail. These were received by UBL on 29 November 1980. On 30 November 1980 UBL sent out a telex to BNP pointing out certain discrepancies and asking for a refund. As this is one of several communications which is crucial to this action, I shall set it out in full:

Your Ref No. 546640 and 546641 dtd 19 November 1980 our LC No. AD80/1866 dtd 1 November 1980 documents for USDLRS.110,000 and USDLRS.110,000 total USDLRS.220,000.

Above documents received and observe following discrepancies:

(1) Document of M/s. Pan Associated Pte Ltd. have been negotiated whereas L/C established in favour of M/s. Pan Associated Ltd.

(2) A certificate from M/s. Naraina Trading (Pte) Ltd. 113 High St. Plaza Colombo Court Singapore stating that the goods shipped are in order, has not been submitted along with documents as per our amendment telex dtd 6 November 1980.

(3) Invoice and B/L not evidencing shipment of one percent empty bags shipped free of charge.

Documents treated on collection basis(.) Kindly refund the negotiated amount along with eighteen percent uptodate interest plus USDLRS.20 cable costs to our account with our New York office(.) Telex confirm(.) Urgent(.)

On 3 December 1980 BNP replied to UBL rejecting the contention that the documents were not in order. BNP also pointed out that the telex of 30 November 1980 from UBL did not comply with Article 8(e) and (f) of the UCP. This is another important communication, and its full contents are as follows:

'Beneficiaries' name with 'Pte' is not a discrepancy at all since we as negotiated bank are satisfied that they are one and the company mentioned in your elcee stop moreover the address is the same and they maintain an account with us stop.

Secundo.

For so-called discrepancies Nrs two and three, regarding your tlx amendment of November 1980 beneficiaries have only recd confirmation of such amendment advised by advising bank on 20 stop but since shipment already effected on 17 November 1980 as evidenced by blading and documents negotiated by us on 19 November 1980 this amendment thus became invalid stop.

In view of foregoing and the untenable nature discrepancies raised by your bank we disagree with your contention that documents stand rejected and insist that documents negotiated were in full conformity with credit terms stop.

Moreover your unilateral action in claiming that documents treated on collection basis is not in accordance with the provisions of Article 8E of UCP 290 stop by the provisions of Article Nr 8F of UCP 290 your failure to act in accordance with Article Nr: 8E have precluded your bank from claiming that the relative negotiation was not affected in accordance with terms and conditions of the elcee referred stop as such we are unable to comply with your request for refund our Ref 546640/1 stop.

On 4 December 1980 UBL responded to BNP in these terms:

Rytlx of date in respect of captioned documents(.) Please note the following:

(I) You may refer the guide to documentary credit operation of I.C.C. the World Business Organization No. 305 on p. 35 to check that beneficiaries name and address are shown correctly(.) We do not agree to your contention to accept beneficiary with different name(.)

(II) The amendment to include a certificate from M/s. Nariana Trading (Pte) Ltd. certifying that goods shipped are in order and one percent empty bags must be supplied free of charge was advised by us *vide* our telex message No. 004 on 9 November 1990 that is, much before negotiation(.)

(III) Due to discrepancies pointed out by us we feel that openers would face difficulties in clearing the goods from customs department in view of strict local laws(.)

As the documents are not drawn strictly in conformity with I.C. terms we insist that negotiated amount along with uptodate interest must be refunded under telex advice to us(.) Meanwhile advice disposal instructions(.) Documents holding at your risk and responsibility(.) All rights reserved(.) Rush confirmation(.)

By this action UBL seek to recover the sum of US$220,000 from BNP on the ground that BNP was in breach of the duty of care in negotiating the letter of credit and paying to a person other than the beneficiary named in the letter of credit. Further, as the letter of credit was issued subject to the UCP, UBL also claim that by their telexes of 30 November 1980 and/or 4 December 1980 they are entitled, pursuant to Article 8(e) thereof, to a refund of the money paid out to BNP under the letter of credit.

UBL's claim against HSBC is for the loss and damage they have suffered on account of HSBC's failure to exercise reasonable diligence, skill and care as advising bankers in promptly notifying the beneficiary and/or his bankers of the requested amendments and/or in seeking agreement to such amendments.

Before I proceed to examine the issues in this action, let me first set out the relevant provisions of the UCP:

Article 8

(a) In documentary credit operations all parties concerned deal in documents and not in goods.

(b) Payment, acceptance or negotiation against documents which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorised to do so, binds the party giving the authorisation to take up the documents and reimburse the bank which has effected the payment, acceptance or negotiation.

(c) If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, that bank must determine, on the basis of the documents alone, whether to claim that payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

(d) The issuing bank shall have a reasonable time to examine the documents and to determine as above whether to make such a claim.

(e) If such claim is to be made, notice to that effect, stating the reasons therefore, must, without delay, be given by cable or other expeditious means to the bank from which the documents have been received (the remitting bank) and such notice must state that the documents are being held at the disposal of such bank or are being returned thereto.

(f) If the issuing bank fails to hold the documents at the disposal of the remitting bank, or fails to return the documents to such bank, the issuing bank shall be precluded from claiming that the relative payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

(g) If the remitting bank draws the attention of the issuing bank to any irregularities in the documents or advises such bank that it has paid, accepted or negotiated under reserve or against a guarantee in respect of such irregularities, the issuing bank shall not thereby be relieved from any of its obligations under this article. Such guarantee or reserve concerns only the relations between the remitting bank and beneficiary.

As I see it, as between UBL and BNP the issues that require determination are these:

(i) Whether BNP was correct in negotiating the letter of credit and making payment thereunder to Pan Associated Pte Ltd., when the letter of credit was issued in favour of Pan Associated Ltd. (PAL) and the documents tendered to negotiate the letter of credit were in the name of Pan Associated Pte Ltd. (PAPL).

(ii) If the answer to (i) is in the negative, have UBL failed to comply with Article 8(e) and/or (f) of the UCP, and are they thus precluded from claiming a refund from BNP?

Addition of "Pte" in Documents

I will now deal with the first issue. As can be seen, the difference between the letter of credit and the documents tendered is in the word "Pte". However in both the letter of credit and the documents, the address of the beneficiary was the same. It is not disputed that PAPL had been a customer of BNP since early 1980 and that BNP had been granting banking facilities to PAPL, including overdraft and trust receipts. At all material times PAPL had outstanding trust receipts and overdraft. The amount negotiated by BNP under the letter of

credit was utilised to discharge the outstanding trust receipts of PAPL and the balance was paid into PAPL's current account to reduce its overdraft. The real issue is whether, in view of the fact that in documentary credit all that the parties are concerned with are documents and that there should be strict compliance with the terms set out in the letter of credit, it was in order for BNP to have negotiated the letter of credit in favour of Pan Associated Pte Ltd. when the beneficiary was described as Pan Associated Ltd.

The evidence shows that at the time when BNP negotiated the letter of credit, it was aware of this "discrepancy" among others. I am using the word "discrepancy" in its broadest sense to include any difference, irrespective of the significance. In fact BNP had noted more discrepancies than were pointed out by UBL. We need not concern ourselves with the other discrepancies as nothing in the present claim against BNP turns on those discrepancies. In respect of all the discrepancies by BNP, including the one on the name, BNP had, in accordance with its usual procedure, obtained an internal letter of indemnity from the beneficiary, which was really an indemnity given by the beneficiary without involving a third party.

While it is clear to me that BNP was anxious to negotiate the letter of credit on behalf of PAPL in order to reduce the debts owing by PAPL to BNP under the various facilities granted by BNP to PAPL, that *per se* does not render the negotiation improper. The question really boils down to determining whether the difference in the name was such that BNP should not have negotiated it without the approval of the issuing bank, UBL.

Evidence was adduced before me to show that in Singapore it is not possible for two companies by the names of Pan Associated Ltd. and Pan Associate Pte Ltd. to co-exist, the former indicating a public company and the latter a private company. PW2 (Mr. Sukumaran) who was called as an expert witness by the plaintiffs, agreed that the Registrar would not allow two companies with the same name, such as Four Squares Ltd. and Four Squares Pte Ltd., to be registered.

Mr. Muthupalaniappan (1DW2), a Senior Assistant Manager of BNP told this Court that his officers knew that there could not be two companies in Singapore with the same name, one ending with "Ltd." and another with "Pte Ltd.". He said that such an error could not affect the validity of the documents; it was just a misnomer.

A legal officer from the Registry of Companies, one Mr. John Ng, was called by BNP to testify on this aspect. He stated that it is not possible to have two companies with the names "Enterprise Ltd." and "Enterprise Pte Ltd." to co-exist in Singapore. It seems to me that the basis for this view is s. 27(1)(c) of the Companies Act which provides that except with the consent of the Minister, a company shall not be registered by a name which in the opinion of the Registrar "so nearly resembles the name of another company, corporation or business name as to be likely to be mistaken for it."

Counsel for the plaintiffs contended that in transactions involving letters of credit there should be strict compliance. He relied on this classic passage of Lord Sumner in *Equitable Trust Company of New York v. Dawson Partners Ltd.* [1927] Lloyd's Report 49 at 52:

> It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe. If it departs from the condition laid down, it acts at its own risk.

In *Equitable Trust* one of the documents required was a certificate of quality issued by experts who were sworn brokers. The certificate issued was by only one expert who was a sworn broker. The House of Lords held that there was non-compliance.

Another important authority is *J H Rayner v. Hambro's Bank* [1943] 1 KB 37 where the letter of credit was opened covering a cargo of "Coromandel Groundnuts". The plaintiffs presented bills of lading for "machine-shelled groundnut kernels," accompanied by an invoice for "Coromandel Groundnuts". Apparently in the trade "Coromandel groundnuts" were otherwise known as "machine-shelled groundnut kernels". The Court of Appeal reversed the decision of the Court below and held that the bank was justified in refusing payment. Mackinnon LJ said (at p. 41):

> It would be quite impossible for business to be carried on, and for bankers to be in any way protected in such matters, if it were said that they must be affected by a knowledge of all the details of the way in which particular traders carry on their business.

Goddard LJ explained in this manner why the bank was justified in refusing payment (p. 43):

> In my opinion, in this case, whether the bank knew or did not know that there was this trade practice to treat "Coromandel groundnuts" and "machine-shelled groundnut kernels" as interchangeable terms, is nothing to the point. They were told to establish a credit, and to pay against a bill of lading describing particular goods, and the beneficiary under that credit presented a bill of lading which was not what they had promised to pay against. Therefore, it seems to me, whether it is reasonable or unreasonable for their principals to say that they want a bill of lading for "Coromandel groundnuts," or whether the bank had or had no knowledge of some of the trade practices which are referred to, is not the question. The question is "What was the promise which the bank made to the beneficiary under the credit, and did the beneficiary avail himself of that promise?" In my opinion, in the present case, he did not, and, therefore, I think that the bank was justified in refusing to pay.

In an earlier case *English Scottish and Australian Bank Ltd v. Bank of South Africa* [1922] Lloyd Rep 21, Bailhache J said:

> It is elementary to say that a person who ships in reliance on a letter of credit must do so in **exact compliance** with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit as opened. (Emphasis is mine)

Similarly in *Moralice (London) Ltd. v. E D & F Man* [1954] 2 Lloyd's Rep 526 the Court held that the *de minimis* rule did not apply in a letter of credit transaction. There the goods involved was 500 metric tons of sugar. The documents showed only 499.7 metric tons. McNair J held that the confirming bank could not be compelled to pay on the letter of credit and neither could the bank have "as against their principal, the Iraqi buyer, justified a payment of that sum against the documents in that form." The Court held this notwithstanding that the beneficiary offered to draw a slightly lessor amount in proportion to the shortfall.

In a Singapore case *Overseas Union Bank v. Chua Teng Hwee* [1964] MLJ 165 a certificate of inspection evidencing shipment of about 25 tons of seaweed (tengusa) was required. The certificate submitted left out the word "tengusa". Winslow J held that there was no "strict accord" or "exact compliance" He said:

> if the buyer insisted on an inspection certificate evidencing shipment of the required quantity of 'seaweeds (tengusa)' they were entitled to have an inspection certificate certifying that the goods in question were 'seaweeds (tengusa)'. It was not sufficient to supply a mere certificate of weight of seaweeds.

A rather interesting case is *Bank Melli Iran v. Barclays Bank* [1951] 2 Lloyd's Rep 367. There the goods purchased were 100 new Chevrolet trucks. One of the documents required was a USA Government undertaking confirming that the trucks were new The invoice tendered described the goods as "100 one ton Chevrolet trucks in new condition." The US Government certificate referred to them as "100 new, good, Chevrolet". McNair J held that the phrase "in new condition" was not or might not be synonymous with the term "new". As regards the US certificate he held that "new (comma) good" might connote something different from the description "new" and that it might have a special trade meaning in relation to motor vehicles.

Dr. Ellinger (IDW5), who was called by the 1st defendant as an expert on banking practice, in his book "Documentary Letters of Credit" identifies the duty of strict compliance as one of the characteristic features of irrevocable letters of credit. He says at p. 198 that "only a perfect tender may be safely accepted by the banker". Later at p. 258 he says:

> The negotiation-banker must, therefore, be careful to negotiate only a draft which complies strictly with the terms of the documentary credit. Otherwise he is not entitled to remuneration from the issuing-banker.

And at p. 279:

> The tender must include that which has been stipulated: nothing else should suffice.

In his book Dr. Ellinger recognises that the strict rule on compliance could in some circumstances lead to harsh results. He nevertheless feels that is the law. This is what he says at p. 281:

> It is obvious that this strict rule can sometimes lead to harsh results. Often it is difficult for a seller to comply with all the terms of the credit. Since he does not issue all the documents himself, he is not in full control of the situation. Moreover, if the non-conformity is an incidental or trivial matter or if, despite the non-conformity of the documents, the goods are as bargained for, the seller might sustain a loss, despite his performing the contract of sale.
>
> There is indeed a view - subsequently submitted to be the better one - that, despite any hardship, this is the law. Moreover, some cases even go sofar as to demand literal compliance. In other words, they appear to demand that not only the tender of documents as a whole, but also that every document should fully comply with each of the terms of the documentary credit.

He then goes on to discuss the theory which seems to have originated in Germany and which gives the banker some discretion in the matter but feels that the theory is not acceptable. He also discusses certain judicial *dicta* which seem to suggest that technical defences should be discouraged but concluded that:

> any deviation justifies rejection of a tender of documents. There is, really, no ground for examining the motivation of a refusal of a tender ... it can be very difficult to draw any line between technical and non-technical defences.

Finally I would quote what Donaldson J (as he then was) said in *The Galatea* [1979] 2 Lloyd's Rep 450:

> A tender of documents which properly read and understood calls for further inquiry or are such as to invite litigation are a bad tender.

On these authorities it seems reasonably clear that any discrepancy, other than **obviously** typographical errors, will entitle either the negotiating or the issuing bank to reject. It is tempting to say that whether a bank is entitled to reject must surely depend on whether the discrepancy is really material. But why should a bank assume the responsibility of determining

the question of materiality and take the risk of it if it goes wrong. As is so clearly stated in the UCP, documentary credit transactions are concerned with documents. There cannot be any doubt that the name of the beneficiary is a very significant matter. However, in his evidence before this Court, Dr. Ellinger described this particular discrepancy in the name as "commercially insignificant" and expressed the view that the tender was good. He held this view because in Singapore you cannot have two companies with the same name, for example, "Pan Associated Pte Ltd." and "Pan Associated Ltd.".

At this juncture I will refer to two American cases which have been cited to me. In *Bevene & Hanson v. Irving Trust Co.,* a decision of the US Court of Appeal (2nd Circuit), the bill of lading presented to Irving Trust misspelled the name of the person to whom notice was to be given on the arrival of the goods - Mohammed **Soran** instead of Mohammed **Sofan**. The US Court of Appeal agreed with the District Court that the misspelling was a material discrepancy. What is interesting is that the Court also stated that:

> some variations in a bill of lading might be so insignificant as not to relieve the issuing or confirming bank of its obligation to pay.

The Court also explained that was not a case:

> where the name intended (was) unmistakably clear despite what (was) obviously, a typographical error, as might be the case if, for example, 'Smith' were misspelled 'Smithh'.

The other American case is *Bank of Montreal v. Federal National Bank & Trust Co. of Shawnee* 622 Fed Supp 6 where there is an ambiguity in the letter of credit itself. In the establishment clause a company was referred to as "Blow Out Products Ltd." But in the certification clause it was referred to as "Blow Out Prevention Ltd.," which was a nonexistent company. There a company, Barton Valve, sought financial aid from the Bank of Montreal for its business associates, Blow Out Products Ltd., Blow Out Prevention Equipment Services Ltd. and Mattco Machine Ltd. To obtain the facility, Barton Valve caused Federal National to issue a letter of credit to the Bank of Montreal. The US District Court at Oklahoma held that:

> A more reasonable construction of the letter of credit is that it must be read as a whole, taking the certification clause in conjunction with the establishment clause. Viewed in this light the substitution of Blow Out Prevention Ltd. for Blow Out Products Ltd. on the certification clause is clearly a draftsman's error.

In coming to this conclusion, the Court applied the principle that where the language contained in an agreement is contradictory or ambiguous or doubtful so that the contract is fairly susceptible of two constructions one of which makes it fair customary and such as prudent men would naturally enter into, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the former interpretation must be preferred to the latter. It also felt that the ambiguity in the letter of credit must be resolved against the issuing bank.

Having considered all the authorities referred to above and the circumstances of this case, I would, though not without some hesitation, follow the approach adopted by Lord Goddard in *Rayner v. Hambro's Bank* in holding that BNP could and should have rejected the documents tendered. As was held in *Hayner v Hambro's Bank* whether a tender is good or bad cannot depend on whether the banker knows that in the trade "Coromandel Groundnuts" is another name for "machine-shelled groundnut kernels"; so too must be the position here that whether the tender is good or bad cannot depend on whether the banker is aware that in law you cannot have a company "ABC Pte Ltd." and another company "ABC Ltd." Moreover while under s. 27(1)(c) of the Companies Act the Registrar will not register a

company by a name which so nearly resembles the name of another company, as to be likely to be mistaken for it, this is not an absolute provision. There could be exceptions with the consent of the Minister. A negotiating bank can only be certain of the position if it makes a search at the Registry of Companies. But I seriously doubt that the bank is expected to make such inquiries bearing in mind all that should be looked at are the documents. I emphasise again that in letters of credit transactions, the parties are only concerned with documents. The bank is therefore entitled to reject the documents unless the beneficiary replaces the documents with new documents with the correct name or request the applicant of the letter of credit to agree to the modification. If it accepts, it is accepting at its own risk. In coming to this conclusion I have borne in mind the comments of Gutteridge and Megrah on *The Law of Bankers' Commercial Credits* (7th Edn.) at p. 120:

> The strict compliance to which Lord Sumner drew attention in *Equitable Trust Co. v. Dawson Partners* does not extend to the dotting of i's and the crossing of t's or to obvious typographical errors either in the credit or the documents.

The present discrepancy does not fall within that.

The American case *Bank of Montreal v. Federal National* is not quite the same. It was not concerned with an unrestricted letter of credit. More importantly, that case involved an ambiguity in the document itself where the Court applied the *contra preferentum* rule.

I cannot help but feel that the reason why BNP in this instance took the risk in so accepting the documents was because it realised that it could not be any worse off by doing so since PAPL was already owing it in excess of the amount stated in the letter of credit and, having obtained an indemnity from PAPL, if a refund had to be made, it would just be "back to square one" for BNP.

2nd Issue: Was there proper rejection?

I now proceed to examine the second issue: was there proper rejection of the documents by UBL in accordance with Article 8 of the UCP.

The evidence of UBL is that they received the documents from BNP on 29 November 1981. They completed the checking of the documents on that day, taking about half an hour. They noted the discrepancies relating to the name and the absence of a certificate from Naraina Trading and evidence of the 1% empty bags. These were stated in their telex of 30 November 1981, which concluded in these terms "Documents treated on collection basis. Kindly refund the negotiated amount ..." Now the question is whether this response satisfies the requirements set out in Article 8(e) of the UCP. It cannot be open to question that the plaintiffs had in this telex asked for a refund of the payment made under the letter of credit. The only question is whether the plaintiffs had also stated that the documents were being held at the disposal of BNP or were being returned to BNP. As provided in Article 8(f) this is essential if UBL are to be entitled to a refund. This, in turn, will depend on the meaning of the expression "documents treated on collection basis."

I do not think there is an objective meaning to the words "on collection basis". Much would depend on the context. Under Article 8(e), UBL must in the notice state that the documents "are being held at the disposal of such bank or are being returned thereto." The words "documents treated on collection basis" were stated in the concluding paragraraph of UBL's telex, after reference was made to the discrepancies. Admittedly, Article 8(e) does not require that any precise form of words has to be used: see *The Royan* [1988] 2 Lloyd's Rep 250 at 254. In the context of the telex of 30 November 1980, I think a fair view of those crucial words would be that UBL would try to obtain the acceptance of the applicant to those

documents. UBL could not be unaware of the requirements of Article 8(e). They incorporated the UCP into the letter of credit. I am inclined to agree with the views expressed by Dr. Ellinger that those words in the context mean that UBL were holding the documents and would be going back to the applicant. I may add that even Mr. Bokhari (PW1), the Vice-President of UBL, agreed that the expression could only mean that the documents did not comply with the letter of credit and that UBL were going to go back to the applicant. It would have been quite different if BNP, having discovered the discrepancies in the documents, were to send them over to UBL on a collection basis. That would mean that BNP was asking the issuing bank to go back to the applicant for his approval. In the circumstances of this case if it were intended that UBL would be prepared to hold the documents on a collection basis on behalf of BNP the correct thing for UBL to have said would be something like this: "The documents are held at your disposal. However, if you wish, we will hold them on collection basis." In my view, it would be stretching the meaning of the expression "documents treated on collection basis" to the extreme to suggest that it could mean that the documents were being held at the disposal of BNP.

The next point to consider is whether the defect in the telex of 30 November 1980 could be made good by the telex of 4 December 1980. Counsel cited to me the case *Bankers Trust Co. v. State Bank of India,* a decision of Hirst J, reported in the London Times of 4 September 1990. The case is yet to be reported in the law reports. That case concerned Article 16 of the 1983 revision of the UCP. On this point, Article 16 is very similar to Article 8 of the 1974 revision. Hirst J held that under Article 16 of the UCP (1983) a reasonable time when an issuing bank had to examine the documents presented to it before refusing them on the ground that they appeared upon their face not to accord with the terms of the credit agreement was the time required by the bank to determine on the basis of the documents alone whether to take up or refuse them. He rejected the argument that a reasonable time included time for the issuing bank to refer to the applicant of the letter of credit; but this would not preclude the issuing bank consulting the applicant whether he wished to waive the discrepancy provided, and this was very important, that was done within the reasonable time needed by the issuing bank itself to carry out its function and did not extend it.

In my judgment, I think there are two reasons why UBL must live with their notice of 30 November 1980. First, having decided to hedge their notice, I am afraid UBL had used up its option on 30 November 1980. I do not think it was open to UBL to have a second bite. Article 8(e) and (f) is very clear on this. The notice must state that the documents are being held at the disposal of the negotiating bank or are being returned thereto. This was not done. Second, I think the telex of 4 December 1980 is in any case too late. Under Article 8(d) the issuing bank has a reasonable time within which to examine the documents and to determine whether to make a claim. Article 8(e) provides that if a claim is to be made the notice must be given without delay by cable or other expeditious means to the negotiating bank. Dr. Ellinger (1DW5) expressed the view that from his knowledge and experience a notice given within three to four working days for a normal sort of a case would not be unreasonable. For a case involving voluminous documents a period of up to seven or eight working days might still be reasonable. But in the present case, as a matter of fact, UBL completed the examination of the documents within a day. They in fact replied on 30 November 1980. To reply on 4 December 1980 when it could be done on 30 November 1980 must necessarily suggest that there was delay. The fact that 2 December 1980 was the national day of the United Arab Emirates does not really alter the fact that there was delay.

Accordingly, I hold that the plaintiffs, having failed to comply with Article 8(e) and (f) of UCP, are precluded from making a claim against BNP for a refund.

Claim against the 2nd Defendant

I now turn to the claim against HSBC. This basically involves a consideration of the questions whether HSBC had failed to exercise all reasonable care to bring the amendments to the attention of the beneficiary and whether the loss was caused by that failure. It is necessary that I should recap all the important milestones of the case:

1 November 1980	-	Issue of LC. Telex from UBL to HSBC advising of the issue of let ter of credit (LC) ending with the words "details air mailing".
2 November 1980	-	Telex of 1 November 1980 received by HSBC.
3 November 1980	-	HSBC advised PAL of the issue of LC.
6 November 1980	-	Amendment letter from UBL to PAL which was sent by airmail through HSBC.
9 November 1980	-	UBL telexed HSBC on the amendments ending with the words "confirmation airmailing".
10 November 1980	-	HSBC received telex of 9 November 1990.
11 November 1980	-	HSBC received the original LC.
12 November 1980	-	HSBC forwarded original LC to PAL.
18 November 1980	-	HSBC received the amendment letter of 6 November 1980.
19 November 1980	-	BNP negotiated LC. HSBC sought clarification (with reference to telex of 9 November 1980) whether the beneficiary should be PAL or Naraina Trading.
20 November 1980	-	HSBC forwarded amendment letter to PAL.
22 November 1980	-	HSBC pressed for reply to telex of 19 November 1980.
23 November 1980	-	UBL replied to HSBC saying that beneficiary was PAL and that an additional certificate be obtained from Naraina Trading.
24 November 1980	-	HSBC forwarded to PAL the amendment telex of 9 November 1980.
3 December 1980	-	PAPL replied to HSBC to say amendments too late.

At the trial HSBC decided not to call any evidence in rebuttal. It says that on the plaintiffs' evidence and on the pleadings, UBL have not made out a case against HSBC. Accordingly, I think it is essential that I should set out the full particulars of the complaints alleged in the pleadings. They are as follows:

> 12(1) The second defendants had been supplied with the terms of the amendments, as aforesaid, on or about 10 November 1980, prior to receiving the airmailed letter of credit terms or advising transmitting the same onwards, but took no steps to advise the beneficiaries or their bankers of the amendments until 20 and/or 24 November 1980, having in the meantime queried the purport of the amendments only on 19 November 1980, by telex to the plaintiffs. The second defendants ought in the exercise of reasonable diligence to

have taken steps to advise the beneficiaries and their bankers of the required amendments, and sought their agreement to them, at the latest prior to 19 November 1980 when the first defendants purportedly negotiated the credit and effected payment to Pan.

(2) The documents presented to the first defendants (against which they purported to negotiate the credit, and to effect payment) were false documents. No goods had been shipped per the m.v. "PINELOPI" and none were ever shipped by that or any other vessel for delivery to the plaintiffs or to the third defendants. The m.v. "PINELOPI" was not in Singapore on 17 November 1980, and did not call at that port until 27 November 1980. The bill of lading and other documents presented were not, therefore, genuine documents, and contained misrepresentations as to the existence, whereabouts and shipment of the goods, as to the carrying vessel and her time of sailing, and as to the authority of Notas to issue the bill of lading and to make a contract for the owners of the m.v. "PINELOPI" on the terms thereof.

(3) If the amendments had been duly advised, the deception of the first defendants into negotiating the credit and effecting payment to Pan in respect of non-existent goods would have failed. It would have been necessary, for such deception to succeed, to present documents appearing to be in conformity with the amended terms and in particular a certificate from Messrs. Naraina Trading (Pte) Ltd. No such certificate could have been obtained, Naraina being wholly innocent of any involvement in the deception practised against the first defendants.

(4) Accordingly, if the amendments had been duly advised, the plaintiffs would have not been debited, as they have been as aforesaid.

The first question to consider is whether HSBC was at fault in not communicating immediately to PAL the amendment telex of 9 November 1980 or in not communicating it at the time when HSBC forwarded the original letter of credit to PAL. Now the telex of UBL of 1 November 1980 advising HSBC of the issue of the letter of credit was not the operative document. The words "details airmailing" clearly show that. Mr. Bokhari (PW1) agreed to this. It is also in accordance with Article 4(a) of the UCP. I further note that the telex of 9 November 1980 ended with the words "confirmation airmailing", which again suggest to me that this telex was not the operative document but the amendment letter that would come through by air-mail. Here too PW1 and PW2 agreed that the telex was not the operative document. The letter of credit was an irrevocable one. Any amendment or alteration thereto would require the consent of all the parties, including the beneficiary, but not of negotiating bank: see Article 3(c) of the UCP.

The question is not one without some difficulties. One view of the matter is that if it was intended by UBL that HSBC should communicate the amendments straight away to the beneficiary UBL should have said so and not used words such as "confirmation airmailing" which no doubt would lull a reasonably prudent person not to act upon it until the amendment letter had arrived. The other view is that the mere fact that a telex is sent *ipso facto* suggests that the matters contained therein should be conveyed right away even though the amendment letter proper will only come in the mail later. Otherwise why would UBL give advance notice of the amendments by telex. The conduct of HSBC when it received the telex of 1 November 1980 from UBL is in consonant with this view. On balance, I think the latter view is to be preferred. If nothing else there is an advantage in conveying the amendment telex immediately to the beneficiary, that is, the beneficiary would have the time to consider the amendments while the amendment letter was in the post.

I come to the next point: the fact that the amendment telex of 9 November 1980 had failed to state the name of the beneficiary. PW2 agreed that a telex amendment should state the name of the beneficiary. If, as I think, it was the duty of HSBC to immediately convey the

amendment telex to the beneficiary, then it seems to me that if the absence of the name of the beneficiary had caused some difficulties then surely any prudent banker would have reverted to the issuing bank to seek clarification. Why did it wait until 19 November 1980? Why was it that in the telex of 19 November 1980 HSBC did not refer to the amendment letter received the day before? Why did it send a reminder on 22 November 1980 when the amendment letter was already sent to PAL on 20 November 1980? Why did HSBC send the telex of 9 November 1980 to the beneficiary on 24 November 1980 after the amendment letter was sent on 20 November 1980. There is no evidence from HSBC to explain all these. Looking at the circumstances as a whole I think there was clearly confusion or oversight on the part of the staff of HSBC. Someone there at HSBC (or there could be more than one person involved) was obviously not doing his work properly. I do not think all these queries could be explained away just by the fact that the amendment telex of 9 November 1980 did not specify the name of the beneficiary.

Having said the foregoing, the burden is still on the plaintiffs to show that the failure on the part of HSBC in notifying the beneficiary of the amendments had caused the loss. The burden is on UBL to prove para. 12(3) of the amended statement of claim, that is, "if the amendments had been duly advised, the deception of the 1st defendants into negotiating the credit and effecting payment to (PAPL) in respect of non-existent goods would have failed." There was no clear evidence before me to show how the fraud was perpetrated but it seems to have been perpetrated by either PAPL and/or others from whom PAPL had purported to procure the goods. Equally, there is no evidence that had the amendment telex of 9 November 1980 been communicated immediately to the beneficiary that would have foiled the deception. No evidence has been adduced to show that PAPL would agree to the amendments or would so inform BNP of the amendments; we must bear in mind that fraud was involved here. Further, even if PAPL were agreeable to the amendments, there is no evidence to show why the perpetrators, who could fake the bill of lading and the certificate of origin could not also fake the certificate from Naraina Trading. There was just no evidence to show that it was any more difficult to fake such a certificate from Naraina Trading. PW1 agreed that, as this case involved fraud, even if the amendments had been conveyed in time, PAPL could have kept the amendments a secret, Or, if it had disclosed them to the negotiating bank, to say that it did not agree to them, or even if it did agree, to produce a fake certificate. There is nothing to sustain the assertion that if the amendments were conveyed in good time, fraud could have been avoided. Accordingly, UBL have failed to discharge the burden of proof of the cause connection between the loss and the failure on HSBC to notify the beneficiary of the amendments in good time.

The point was also made by UBL that HSBC should have notified the negotiating bank of the amendments. But this being an unrestricted letter of credit, negotiable through any bank, I do not see how there could be any duty on HSBC to find out who the beneficiary's banker was and to notify the amendments to the beneficiary banker. UBL must accept the consequences of an irrevocable and unrestricted letter of credit.

It is most unfortunate that in this case a fraud was perpetrated and the loss has to be borne by innocent parties. But as between the innocent parties, for the reasons I have given above, the plaintiffs have to bear the loss. Accordingly, I would dismiss the plaintiffs' claims against the defendants.

Also found at [1991] 3 CLJ 2012